

Case No. _____

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO PLAINTIFFS AND
THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendants FLUENT, LLC, served and f/k/a FLUENT, INC.; REWARD ZONE USA, LLC; REWARDSFLOW LLC; AMERICAN PRIZE CENTER, LLC; and MOHIT SINGLA (“Defendants”) hereby remove the state court action entitled *Mira Blanchard, et al. v. Fluent, Inc., et al*, San Francisco County Superior Court, Case No. CGC 16-554299 (“the Action”) to this Court pursuant to 28 U.S.C. sections 1332, 1441, and 1446.

This Notice is based upon the original jurisdiction of the federal district court over the parties under 28 U.S.C. section 1332 based upon complete diversity of citizenship between plaintiffs and the “properly joined defendants.” As set forth herein, Defendant Andres Mary is an improper defendant, fraudulently joined to defeat diversity, and his alleged citizenship (which is alleged to be in California) should not be considered.

I. REMOVAL JURISDICTION – Civil Local Rule 3-5(a)

1. This action may be removed to this Court by the Defendant pursuant to the provisions of 28 U.S.C. section 1332, because, as set forth below, complete diversity exists among the plaintiffs and non-fraudulently joined defendants and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

II. RELEVANT PROCEDURAL FACTS REGARDING TIMING OF REMOVAL

2. On September 16, 2016, Plaintiffs filed their Complaint in this case in the Superior Court of California, County of San Francisco. It was not served. On December 20, 2016 plaintiffs filed a First Amended Complaint (“First Amended Complaint”).

3. Defendant Fluent, LLC f/k/a Fluent, Inc. (“Fluent”) was served as Fluent, Inc. by personal service on its agent for service of process, Mohit Singla, on March 6, 2017.

4. On February 14, 2017, Plaintiffs’ counsel purported to serve the First Amended Complaint on Defendants Reward Zone USA, LLC, Rewards Flow, LLC, American Prize Center, LLC, and Mohit Singla, along with a Summons, ADR Information packet, Notice of Case Management Conference, and Order Continuing CMC – all served via mail pursuant to California Code of Civil Procedure Section 415.40. As a result, service was effective on said

defendants 10 days after mailing, on February 24, 2017.

5. On March 22, 2017, Fluent timely removed this case alleging federal diversity jurisdiction (including allegations of the Plaintiffs' including of a sham defendant, Andres Mary, as a California citizen (he is actually from Argentina) presumably to avoid removal). *See Blanchard, et al. v. Fluent, Inc., et al.* Case No. 17-cv-01551-MMC, Dkt No.1. Each of the other removing defendants herein (Reward Zone USA, LLC, Rewards Flow, LLC, American Prize Center, LLC, And Mohit Singla) consented to removal at that time.¹ *Id.*, Dkt. Nos. 2-5. At the time of removal, and upon information and belief, no other defendant had been served. Based on service of the First Amended Complaint, removal was therefore timely under 28 U.S.C section 1446(b)(1).

6. Following removal, Fluent filed its Answer in Case No. 17-cv-01551-MMC on March 29, 2017. Case No. 17-cv-01551-MMC, Dkt No.15. The very same day, another non-Fluent served defendant, Sauphtware, Inc., filed a Motion to Dismiss. *Id.*, Dkt. No. 14. Sauphtware, Inc. later filed a Consent to Removal on April 19, 2017. *Id.*, Dkt. No. 23.

7. On April 3, 2017, Plaintiffs filed a Motion to Remand – solely on the grounds that Mr. Mary was a proper defendant and California citizen, and that another served defendant, Sauphtware, Inc. had not consented to removal – even though the “non-consenting” defendant had already filed a responsive pleading in federal court. *See* Case No. 17-cv-01551-MMC, Dkt No.16.

8. Going beyond the scope of the remand motion, the District Court then issued an Order to Show Cause re Remand (“OSC”) on April 4, 2017 – directing the removing defendants to allege, by April 17, 2017, (along with an opposition to the Motion to Remand), the citizenship of *all* defendants – served and not served – to properly demonstrate that there was truly complete diversity. *See* Case No. 17-cv-01551-MMC, Dkt No. 18. Pursuant to Plaintiffs’ and Fluent’s Stipulation, the Court extended the deadline to May 8, 2017. *See Id.*, Dkt No.22.

9. On May 5, 2017, the parties filed a Stipulation for the filing of a Second Amended Complaint, which included additional plaintiffs and defendants. *See* Case No. 17-cv-

¹ All removing defendants are collectively referred to herein as “Fluent.”

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01551-MMC, Dkt No. 24. Due to an alleged lack of diversity given some of the new defendants, the parties further contemplated that, if the Second Amended Complaint were permitted to be filed in federal court, the Motion to Remand and OSC would be incomplete. *Ibid.* As such, on May 8, 2017, the parties also filed a Stipulation to further continue the deadline for responding to the motion and OSC. *Id.*, Dkt.No. 25.

10. Fluent's intent was to address the purported lack of diversity, as well as the impropriety of additional parties in its responsive pleading and the opposition to any amended remand motion. *See* Declaration of Andrew D. Castricone, Esq. ¶7. Fluent's position that additional defendants were being added simply to avoid diversity and that the amended complaint should not survive. *Ibid.*, *See, e.g. Desert Empire Bank v. Insurance Co. of No. America* 623 F.2d 1371, 1376-1377 (9th Cir. 1980); *Clinco v. Roberts* 41 F.Supp.2d 1080, 1086 (CD Cal.1999); and *Winner's Circle of Las Vegas, Inc. v. AMI-Franchising, Inc.* (D NV 1996) 916 F.Supp. 1024, 1025 (D NV 1996).

11. However, on May 11, 2017, the Court denied to enter an order on the stipulations, finding that diversity jurisdiction "is determined (and must exist) as of the time the complaint is filed and removal is effected." *See* Case No. 17-cv-01551-MMC, Dkt No. 26. However, the Court recognized Fluent's likely reliance on the stipulation, and further extended Fluent's responses to the motion and OSC until May 18, 2017. *Ibid.*

12. Despite the District Court's indication that it did not want to address any possible changes to the pleadings pending a determination of jurisdiction, Plaintiffs nevertheless filed **three motions** on May 12, 2017 - a Motion to Substitute Name of Defendant, a Motion to Correct Name of Doe Defendants, and an Amended Motion to Remand. *See* Case No. 17-cv-01551-MMC, Dkt Nos. 27, 28, 29. On the very same day, the Court entered an Order denying all of the motions, without prejudice, until jurisdiction had been resolved. *Id.*, Dkt. No. 30.

13. In an almost immediate response, on May 15, 2017, and to clearly skirt the Court's ruling, Plaintiffs' counsel then filed a separate action in the California Superior Court in and for the County of San Francisco, *Duncan, et al. v. Fluent, LLC, et al.* ("Duncan"), SFSC Case No. CGC-17-558932, naming the very same plaintiffs and defendants they had

1 unsuccessfully tried to add to the operative complaint in the District Court just three days earlier.
 2 *See* Castricone Decl., Ex. “B.” To date, the *Duncan* matter has not been served, Plaintiffs’
 3 counsel has never discussed the Duncan case with Fluent’s counsel. *Id.* at ¶7. The only thing the
 4 *Duncan* plaintiffs have done is to file a Request for Dismissal, without prejudice, of one of the
 5 named plaintiffs, Bunny Segal. *Id.* at ¶7-8; Ex. “C.” The Request for Dismissal, the reason for
 6 which is unknown, was filed on June 26, 2017. *Ibid.*

7 14. On May 18, 2017, Fluent filed a lengthy Opposition and Response to the OSC.
 8 *See* Case No. 17-cv-01551-MMC, Dkt Nos. 31-35. In addition to submitting evidence regarding
 9 Mr. Mary, the Sauphtware, Inc. consent issue, and further information on the citizenship of the
 10 served defendants, the papers included voluminous evidence of Fluent’s investigation of the
 11 ***named but non-served*** defendants and the domain names at issue, and identified various
 12 connected non-parties (including Experions.com, LLC) to establish complete diversity. *Ibid.*
 13 With respect to Experions.com, LLC, Fluent noted that it had, at the time, been unable to
 14 confirm the citizenship of Experions.com, LLC’s individual members (and requested more time
 15 to so so). *Ibid.*

16 15. In their May 25, 2017 reply papers, Plaintiffs focused on Mr. Mary, Sauphtware,
 17 Inc., and Fluent’s arguably vague description of unserved defendant, AdReaction’s, relationship
 18 to a Canadian corporation. *See* Case No. 17-cv-01551-MMC, Dkt Nos. 37-38.

19 16. The matter was taken under submission without oral argument. The Court
 20 remanded the action on June 8, 2017 on narrow issues regarding the failure to completely
 21 address Experions.com, LLC’s citizenship and, in a footnote, the vague allegation related to
 22 AdReaction. Case No. 17-cv-01551-MMC, Dkt No.47. Again, the Court expressly noted that,
 23 within 30 days of receipt of evidence of complete diversity, Fluent could seek to remove again.
 24 *Ibid.* *See* Castricone Decl., Ex. “A.”

25 17. Since the time of the Order, Fluent and its counsel have been seeking additional
 26 evidence regarding the narrow scope of the basis for remand. In doing so, after securing
 27 evidence between July 28, 2017 and August 7, 2017, and as set forth in the supporting
 28 declarations filed concurrently herein, as well as the evidence submitted in Case No. 17-cv-

01551-MMC, it is respectfully requested that Fluent has established complete diversity of citizenship.

18. Plaintiffs are presently seeking to amend the operative complaint in this matter to add the parties in the already pending and separate *Duncan* matter – presumably in an effort to destroy diversity here.

III. A PROPER BASIS EXISTS FOR REMOVAL

A. There is Complete Diversity Among the Properly Joined Defendants

19. The removing Defendant is informed and believes, based upon Plaintiffs' operative First Amended Complaint, that Plaintiffs were, and still are, citizens of the State of California. *See* First Amended Complaint, attached hereto as part of Ex. "A".

20. All of the defendants, other than Andres Mary, are alleged to be non-California citizens. Mr. Mary is alleged to have sent at least 6 emails at issue and is also alleged to be a California citizen, based solely on an alleged virtual mailbox purportedly connected with his name located in San Francisco, California. However, upon information and belief, Mr. Mary was and is, at all relevant times, a developer, whose citizenship, residency, and principal place of business is located within Argentina. Upon information and belief, Mr. Mary, as a developer, would also not have been the person/entity sending the email from the domains alleged in the First Amended Complaint. As such, for purposes of removal, Andres Mary's citizenship should be disregarded. Mr. Mary's citizenship was fully addressed in Fluent's Opposition/Response to the Motion to Remand and Order to Show Cause in Case No. CGC-17-558932, Dkt. Nos. 31-35.

21. Served defendant Sauphtware, Inc., which consented to federal jurisdiction previously, provided Fluent with a renewed consent to removal on August 4, 2017; the consent is being filed concurrently herein.

22. Upon information and belief, the remaining defendants other than the Fluent have been not served and/or have not yet appeared or filed any papers in the state court action. Upon service, if effectuated, consent to removal of the other defendants will be requested.

B. The Amount in Controversy Exceeds \$75,000, Exclusive of Interest and Costs

23. The First Amended Complaint's prayer for relief seeks damages of at least

1 \$1,265,000.

2 **IV. ALL PROCEDURAL REQUIREMENTS FOR REMOVAL ARE SATISFIED**

3 24. The Summons on First Amended Complaint, First Amended Complaint, ADR
4 Information Packet, Notice of Case Management Conference, and Order Continuing Case
5 Management Conference (as well as a recently received second Order Continuing Case
6 Management Conference) were served on Fluent, LLC via personal service on March 6, 2017,
7 and on the remaining Fluent defendants in this matter via mail on February 14, 2017 pursuant to
8 California Code of Civil Procedure section 415.40, which makes service effective February 24,
9 2017 as to those defendants.

10 25. Following service, no defendants have filed any responsive pleading in the state
11 court action. Fluent filed an Answer in Case No. CGC-17-558932 on March 29, 2017.

12 Sauphtware, Inc. filed a Motion to Dismiss on the same date. The motion was never ruled upon.

13 26. Per the June 8, 2017 Order in Case No. CGC-17-558932, this notice is filed
14 within 30 days after receipt of “a copy of an amended pleading, motion, order or other paper
15 from which it may first be ascertained that the case is one which is or has become removable.”
16 Thus, removal is timely and proper pursuant to 28 U.S.C. section 1446(b).

17 27. As required by 28 U.S.C. section 1446(a), copies of “all process, pleadings, and
18 orders served upon such defendant[s]” regarding the state court action are attached to this Notice
19 of Removal (along with the operative complaint) as Exhibit “A.” The documents comprising
20 Exhibit “A” are: Complaint; Summons on First Amended Complaint; First Amended Complaint;
21 ADR Information packet; Notice of Case Management Conference; Order Continuing CMC; the
22 second Order Continuing Case Management Conference; Proofs of Service of Summons on First
23 Amended Complaint; Order Taking CMC Off Calendar; Fluent’s Opposition to Plaintiffs’
24 Motion to Amend; USDC 06-09-2017 Letter to San Francisco Court re Remand; Plaintiffs’
25 Motion to Amend the Complaint; Corrected Motion to Amend Documents; Fluent’s opposition
26 to the Motion to Amend the Complaint; and Plaintiffs’ Reply re the Motion to Amend. The
27 documents are attached as Exhibit A, Parts 1-4.

28 28. A copy of this Notice of Removal, without exhibits, is being filed with the Clerk

of the Superior Court of the State of California in and for the County of San Francisco.

29. A copy of this Notice of Removal, without exhibits, and copies of each consent to removal and supporting declarations are being served on Plaintiffs' counsel.

V. INTRADISTRICT ASSIGNMENT

30. Pursuant to Civil Local Rule 3-5(b), this identifies the basis for assignment to a particular location or division of the Court pursuant to Civil Local Rule 3-2 (c). Pursuant to Civil Local Rule 3-2 (c), all civil actions shall be assigned to a courthouse serving the County in which the action arises. Under Civil Local Rule 3-2 (d), actions such as this, arising in the County of Alameda, may be assigned to San Francisco or Oakland. This matter should therefore be assigned to the San Francisco or Oakland Division pursuant to Civil Local Rule 3-2(c), (d).

VI. CONCLUSION/PRAYER

For the reasons describe above, Plaintiffs' claims are properly removable under 28 U.S.C. sections 1332, 1441.

WHEREFORE, Defendant prays that the State Court Action be removed to this Court and this Court accept jurisdiction of this action in its entirety and henceforth that this action be placed on the docket of this Court for further proceedings, the same as if this action had been originally filed in this Court.

Defendant requests a jury trial.

Dated: August 7, 2017

GORDON & REES SCULLY MANSUKHANI, LLP



By _____

Andrew D. Castricone

Attorneys for Defendants FLUENT, LLC, served and f/k/a FLUENT, INC.; REWARD ZONE USA, LLC; REWARDSFLOW LLC; AMERICAN PRIZE CENTER, LLC; and MOHIT SINGLA